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No. 08-428

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JERRY GREENBERG,

Petitioner,

v.

NATIONAL GEOGRAPHIC SOCIETY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state that:

National Geographic Society is a 501(c)(3) tax-exempt, non-profit entity organized under the laws of the District of Columbia. The Society has no parent corporation and no publicly held corporation owns 10% or more of its stock.

National Geographic Enterprises, Inc., now incorporated under the name NGHT, Inc. is a company organized under Delaware law. It is a wholly-owned subsidiary of National Geographic Society, and therefore, no publicly held corporation owns 10% or more of its stock.

Mindscape, Inc. has dissolved as a corporation within the United States. Accordingly, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

In its *en banc* decision, the Eleventh Circuit—guided by this Court's decision in *New York Times Co. v. Tasini*—correctly interpreted § 201(c) of the Copyright Act and eradicated a previously-existing conflict with the Second Circuit. The now-harmonious interpretation of § 201(c) achieves the Congressionally-ordained balance between the interests of individual freelance contributors, on the one hand, and the publishers of periodicals, on the other. For their part, freelance contributors can—and do—continue to exploit their own individual contributions.

Embraced by the Register of Copyrights, this now-settled interpretation permits publishers of collective works to make available to the public their complete archives of past publications. This salutary result is warmly welcomed by librarians, archivists and historians. Inasmuch as the meaning of § 201(c) is now clear by virtue of *Tasini* and the harmonious post-*Tasini* rulings of the Second and Eleventh Circuits, no further review is warranted.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Respondent National Geographic Society (the Society or National Geographic) is one of the world's largest nonprofit scientific and educational organizations, with nearly ten million members worldwide. The Society engages in promoting and funding scientific research, exploration, and grants for geography education. Its mission is to increase and diffuse geographic knowledge and to inspire individuals to care about the planet and its people.

Since its founding in 1888, the Society has published a monthly official journal, *National Geographic* magazine.

For over a century, the Society reproduced back issues of the magazine in bound volumes. In addition, for nearly five decades, the Society has reproduced back issues in microfiche and microfilm. With the advent of CD-ROM technology in recent years, the Society in 1997 produced "The Complete National Geographic" (CNG), a thirty-disc CD-ROM archive containing each monthly issue of the magazine for the 108 years of its existence—from 1888 through 1996.

The CNG was produced through digital scanning: each issue of the magazine was scanned two pages at a time into a computer system. The CNG is an exact, image-based reproduction of the magazine. Every page of each issue remains as it was in the original paper versions, including all page arrangements, articles, photographs, graphics, advertising, and attributions.

Like any other CD-ROM product, the CNG contains a computer program. That program compresses and decompresses the images for viewing on a screen and allows the user to search an electronic version of the magazine's traditional subject, title, and author-based index (just as a reader might search a paper index). An article, once retrieved through the search function, appears just as it did in the original paperbound magazine, with all of the surrounding materials from the original magazine. The CNG neither provides a mechanism for the user to separate the photographs from the text nor otherwise to edit the pages.

Whenever a CNG user inserts a disc into a CD-ROM drive, an introductory sequence appears. It begins with a moving display of the Society's logo and theme song followed by a Kodak advertisement, and then a 25-second segment in which ten magazine covers digitally fade into each other. A user need only view these elements once. When opening the program on subsequent occasions, the user can stop the introductory sequence at any time with the click of a mouse.

Petitioner Jerry Greenberg is a freelance photographer whose pictures were published in the January 1962, February 1968, May 1971, and July 1990 issues of *National Geographic* magazine.

B. Procedural History

1. Greenberg filed this lawsuit in December 1997, alleging that the Society's digital reproduction of his photographs in the CNG infringed his individual copyrights.[1] Before answering those allegations, the Society moved to dismiss Greenberg's claims, or in the alternative for summary judgment, based on § 201(c) of the Copyright Act. That statute provides:

> In the absence of an express transfer of the copyright ..., the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that

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[1] There is no dispute that the Society had the right to use, and that Greenberg authorized, the initial publication of his photographs in *National Geographic* magazine.

> particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c).

The district court granted summary judgment in National Geographic's favor. Greenberg appealed, and a panel of the Eleventh Circuit reversed. *Greenberg v. National Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001) (*Greenberg I*). *Greenberg I* held that § 201(c) did not apply to a "new" collective work (as opposed to a "revision" of the original collective work), and that the CNG was a "new" collective work because it included additional copyrightable material (the computer program and the introductory sequence). The court of appeals denied National Geographic's petition for rehearing and suggestion for rehearing *en banc*. This Court denied certiorari. *See National Geographic Soc'y v. Greenberg*, 534 U.S. 951 (2001).

2. Shortly after the Eleventh Circuit's decision in *Greenberg I*, this Court decided *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). That case involved the use of individual freelance contributions in electronic databases (*e.g.*, LEXIS/NEXIS). Specifically, those databases removed the authors' individual contributions from the context of the original collective works in which they appeared. The *Tasini* Court held that § 201(c) did not apply *precisely because* the individual contributions were divorced from their original context. *See id.* at 499-502. In doing so, this Court expressly distinguished the electronic databases at issue from microfilm and microfiche, which present an individual freelance

contribution in the context of the original collective work. *See id.* at 501-02.

3. On remand from *Greenberg I*, the trial court held that the Eleventh Circuit's decision established liability for copyright infringement, and the case proceeded to a jury trial on damages only.[2] The jury returned a verdict in Greenberg's favor in the amount of $400,000, finding that National Geographic had "willfully" infringed Greenberg's copyright in his individual works. At that point, the Society devoted substantial resources to recall the CNG from the marketplace and has not reintroduced the CNG to the public pending resolution of this litigation.

4. In December 2003, while various post-trial motions remained pending in the *Greenberg* litigation, the U.S. District Court for the Southern District of New York (Kaplan, J.) granted summary judgment in National Geographic's favor in another copyright infringement case involving the same product at issue here, the CNG. *See Faulkner v. National Geographic Soc'y*, 294 F. Supp. 2d 523 (S.D.N.Y. 2003) (*Faulkner I*). The *Faulkner* plaintiffs (like Greenberg) were freelance contributors whose photographs and/or articles were published in various issues of *National Geographic* magazine. Like Greenberg, the *Faulkner* plaintiffs challenged the Society's republication of their individual

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[2] The Society was never afforded an opportunity to interpose other affirmative defenses or otherwise to answer Plaintiff's complaint.

contributions in the CNG. The district court rejected the claims, holding that

> [t]he material [in the CNG], once it is accessed via the software, is presented to, and perceptible by, the user precisely as it appeared in print. In this respect, therefore, *it is precisely comparable to the microforms to which the Supreme Court referred approvingly in Tasini.*

Id. at 540 (internal quotations omitted; emphasis added). Judge Kaplan thus concluded that "the CNG is a revision of the individual print issues of the *Magazine*," and "respectfully disagree[d] with so much of *Greenberg* as held otherwise." *Id.* at 543. The *Faulkner* plaintiffs appealed.

In March 2005, while the post-trial motions in *Greenberg* remained pending, the Second Circuit (speaking through Judge Winter) unanimously affirmed Judge Kaplan's § 201(c) analysis. *See Faulkner v. National Geographic Enters. Inc.*, 409 F.3d 26, 39 (2d Cir. 2005) (*Faulkner II*). Of particular relevance, the Second Circuit agreed with Judge Kaplan that (i) the CNG was a "revision" of the original collective works within the meaning of § 201(c), and (ii) *Greenberg I* conflicted with this Court's supervening ruling in *Tasini*. *See id.* at 37-39.

In October 2005, the *Faulkner* plaintiffs filed a petition for writ of certiorari, seeking review by this Court of the Second Circuit's decision in *Faulkner II*. In view of the clear conflict between the Eleventh Circuit in *Greenberg I* and the Second Circuit in *Faulkner II*, the Society joined the petition. For a

second time, this Court denied review. *See Faulkner v. National Geographic Soc'y*, 546 U.S. 1076 (2005).

5. Approximately the same time in 2005, the district court in the *Greenberg* trial litigation denied National Geographic's post-trial motions and entered judgment in Greenberg's favor. National Geographic appealed to the Eleventh Circuit, arguing (among other things) that the Eleventh Circuit should reconsider *Greenberg I* in light of this Court's supervening decision in *Tasini*. In particular, National Geographic argued that *Tasini* makes clear that the pivotal question under § 201(c) is whether a collective work perceptively reproduces the disputed freelance contribution within its original context. *Greenberg I's* analysis, National Geographic further argued, is thus fundamentally at odds with *Tasini*. The former focuses on whether a collective work includes additional copyrightable material, whereas the latter focuses on whether the collective work is so substantially revised that the individual contribution is presented "clear of the context provided ... by the original periodical editions." *Tasini*, 533 U.S. at 499.

The Eleventh Circuit panel unanimously agreed, concluding that "[i]t is clear ... that the addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege [of § 201(c)]." *Greenberg v. National Geographic Soc'y*, 488 F.3d 1331, 1338-39 (11th Cir. 2007) (*Greenberg II*). Because *Tasini* established "a new, post-*Greenberg I* framework for analyzing the § 201(c) privilege," the panel determined that it was not bound by the prior panel precedent rule. *Id.* at 1338.

6. On July 29, 2007, Greenberg filed a petition for rehearing *en banc* on the solitary issue of whether the *Greenberg II* panel erred by relying on *Tasini's* analytical framework. The Eleventh Circuit granted Greenberg's petition for rehearing *en banc* on August 30, 2007. *Greenberg v. National Geographic Soc'y*, 497 F.3d 1213 (11th Cir. 2007).

The *en banc* court affirmed the *Greenberg II* panel's decision and thus aligned the Eleventh Circuit with the Second Circuit. *Greenberg v. National Geographic Soc'y*, 533 F.3d 1244 (11th Cir. 2008) (*en banc*) (*Greenberg III*). Specifically, the *en banc* court held that "the CNG is a 'revision' of the original 'collective works' under the second prong of § 201(c) based on *Tasini's* definition of 'revision' in conjunction with its discussion of microform." *Id.* at 1249. Indeed, *Greenberg III* concluded that "the CNG is analogous to the microforms discussed [in *Tasini*] ... [because] the CNG uses the identical selection, coordination, and arrangement of the underlying individual contributions as used in the original collective works." *Id.* at 1252. The court rejected Greenberg's argument that the aggregation of multiple collective works into one new collective work took the CNG out of § 201(c)'s protection. *Id.* at 1253 ("[T]he aggregation of multiple issues of the Magazine in the CNG is no different from the aggregation of multiple editions or issues in microform. Aggregation is permissible if the original context of the individual contribution is preserved."). The *en banc* court rejected Greenberg's contention that the addition of new, independently copyrightable materials (the computer program and introductory sequence) renders the work a "new"

collective work. *Id.* at 1255 & n.17 ("The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege, and the pertinent question for a court is whether the new material so alters the collective work as to destroy its original context.").[3] This petition followed.

REASON FOR DENYING THE WRIT

The *En Banc* Decision Harmonized the Circuits' Understanding of § 201(c) And Therefore Does Not Warrant This Court's Review.

Greenberg's petition is most notable for what it does *not* say: namely, that this Court has twice denied certiorari on the very issue presented here. Indeed, the last time this Court did so, a clear conflict existed between the Second Circuit's decision in *Faulkner II* and the Eleventh Circuit's decision in *Greenberg I*. No longer is that so. The conflict has now been fully resolved, and the circuits are in complete harmony as to the meaning of § 201(c).

Indeed, Greenberg concedes as much. *See* Petition at 3 ("The Second Circuit agrees with [*Greenberg III's*] approach."); *id.* at 10 (noting that the *Greenberg III* decision is "echoed by the Second Circuit"). There is simply no reason, now that the Circuits have resolved their differing approaches, for

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[3] The *en banc* court also reinstated that part of the *Greenberg II* decision that found as error the trial court's denial of an answer and the finding as a matter of law that it was error to conclude that National Geographic had "willfully" infringed.

this Court to intervene to reverse the course of now-settled law.

Lacking a circuit conflict, Greenberg contends that *Greenberg III* "warped this Court's holding in *Tasini*," and that it "fundamentally reshaped the carefully calibrated balance that Congress struck in the Copyright Act." *Id.* at 10. Petitioner's amici echo the point. *See* Br. Amici Curiae of Am. Soc'y of Media Photographers, et al., No. 08-428 (Nov. 3, 2008). They are mistaken. Quite to the contrary, *Greenberg III* faithfully follows *Tasini's* straightforward teaching—scrupulously applied by the Second Circuit in *Faulkner II*—that a collective work is a privileged "revision" under § 201(c) if it presents the freelancer's contribution in its original context.[4] At the same time, the *en banc* decision

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[4] The federal official vested with expertise in copyright law, the Register of Copyrights, had written a letter to a Member of Congress that was referenced by the *Tasini* majority favoring the contributors in *Tasini*, 533 U.S. at 496 n.3, but the record reflects that the Register has stated publicly that National Geographic's CNG was a privileged reproduction under § 201(c). Similarly, a number of associations of libraries had filed an amicus brief in *Tasini* favoring the contributors, but many of the same library groups filed an amicus before the Eleventh Circuit stating that National Geographic was privileged under § 201(c) to produce the CNG. *See generally* Br. Amici Curiae of the American Library Association and the Association of Research Libraries in Support of Respondents, 2001 WL 173550 (Feb. 16, 2001); Br. Amici Curiae of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, the Society of American Archivists, and the Special Libraries Association In Support of Defendant-Appellee, 2006 WL 4402466 (June 6, 2006); Br. Amici Curiae of the American Association of Law Libraries, the American Library Association,

vigilantly guards the republication rights of freelancers in their *individual contributions*. The upshot is this: Greenberg remains free to exploit his individual contributions (and indeed has done so), and National Geographic is similarly at liberty to make its past issues available to the public in digital form. That is consistent with *Tasini*, the Second Circuit's decision in *Faulkner II*, and Congress' intent embodied in § 201(c).

A. *Greenberg III* Is Fully Consistent With *Tasini*.

Addressing a question of first impression, this Court in *Tasini* analyzed how an individual freelance contribution may be reproduced as part of a "revision" of a collective work under § 201(c). Specifically, *Tasini* considered whether publishers were privileged to reproduce individual freelance contributions in three electronic databases: (1) LEXIS/NEXIS, (2) the New York Times OnDisc (NTYO), and (3) General Periodicals OnDisc (GPO). *See Tasini*, 533 U.S. at 488-91. The articles at issue had originally appeared in three publications—Newsday, Sports Illustrated, and The New York Times. The periodicals' publishers furnished all the articles from each periodical to two electronic database companies. Of critical importance, the periodicals were not kept in tact when placed into the electronic databases. Rather, each article was

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the Association of Research Libraries, the Medical Library Association, the Society of American Archivists, and the Special Libraries Association in Support of Defendant-Appellee, 2006 WL 5582217 (June 6, 2006).

presented to database users as a single text- or image-based reproduction, completely isolated from the context of the original print publications in which the contributions first appeared. The freelancers challenged the practice, claiming that it violated their individual copyrights. The publishers, on the other hand, claimed that the republication of the articles was privileged under § 201(c) as part of a "revision" of the original publication.

Looking to the text of § 201(c), *Tasini* held that § 201(c) recognizes two distinct and independent copyrights: one in the collective work created by the publisher, and another in the original work of authorship of the freelance contributor. *Id.* at 493-94 (citing 17 U.S.C. § 201(c)). With respect to the former, *Tasini* recognized that the copyright protects only the creative material contributed by a publisher, such as its "selection, coordination, and arrangement." *Id.* at 494. The copyright in the original work, however, vests exclusively in the freelance contributor. *Id.* To retain the divisible nature of the two copyrights, any reproduction of the compilation must balance the right of authors of individual contributions to exploit those contributions while, at the same time, permitting publishers of collective works to reproduce their works in various forms. As *Tasini* explains, § 201(c) accomplishes this goal by granting the publisher of a collective work (like National Geographic) the privilege to reproduce freelance contributions "as part of that particular collective work," or as "any revision" of the collective work. *Id.* at 496-97; 17 U.S.C. § 201(c).

This Court held that the reproductions at issue fell outside the scope of § 201(c) because "each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented." *Id.* at 487; *see also id.* at 488 ("The publishers are not sheltered by § 201(c) ... because the databases reproduce and distribute articles standing alone and not in context."). With respect to LEXIS/NEXIS and NYTO, both of which store individual articles from collective works in text-only format, "an article appears to a user without the graphics, formatting, or other articles with which the article was initially published." *Id.* at 500. And with respect to GPO, which stores individual articles from collective works in image-based format, "the article appears with the other materials published on the same page or pages, but without any material published on other pages of the original periodical." *Id.*

In reaching this conclusion, the *Tasini* Court made clear that a "revision" of a collective work is protected under § 201(c) if it presents an individual contribution as part of "a new 'version,' [which] is ... a 'distinct form of something regarded by its creator or others as one work.'" *Id.* Indeed, the Court went out of its way to note that the reproduction of a collective work in microfilm or microfiche qualifies as a revision. As *Tasini* explained, "articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper." *Id.* at 501. Although "the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on [an] Article, to the exclusion of surrounding material," the dispositive fact remains that the user

"encounters the Article in context." *Id.*; *see also Greenberg III*, 533 F.3d at 1253 ("[T]he aggregation of multiple issues of the Magazine in the CNG is no different from the aggregation of multiple editions or issues in microform. Aggregation is permissible if the original context of the individual contribution is preserved.").

Tasini's (and *Greenberg III's*) pivotal distinction between microfilm and isolated articles in a vast electronic database makes perfect sense. Viewed in light of what each copyright protects, microfilm (as well as bound volumes) exploits only the selection, coordination and arrangement of the collective work. *Greenberg III*, 533 F.3d at 1252 ("Unlike the 'conversion of newsprint to microfilm, the transfer of articles to the [d]atabases [in *Tasini* did] not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another.'" (quoting *Tasini*, 533 U.S. at 502)).

As the *en banc* court recognized, the CNG is simply a digital form of the microform example this Court extolled in *Tasini*. *Id.* ("Applying *Tasini* to the facts before us, we find that the CNG is analogous to the microforms discussed therein. Similar to microfilm or microfiche, the CNG uses the identical selection, coordination, and arrangement of the underlying individual contributions as used in the original collective works."). The CNG presents its users with an exact image-based reproduction of each issue of *National Geographic* magazine in CD-ROM format. As the *Greenberg III* court acknowledged, "[w]hat the user of the CNG sees on his computer screen ... is a reproduction of each page of the Magazine that differs from the original only in

the size and resolution of the photographs and text." *Id.* (quoting *Greenberg I*, 244 F.3d at 1269). Because "every cover, article, advertisement, and photograph appear[s] as it did in the original paper copy of the Magazine," *id.*, "[t]he CNG's image-based reproduction of the Magazine is like microform." *Id.*[5]

The *Greenberg III* court also properly noted that the CNG is different from the GPO database at issue in *Tasini*. Although the GPO presents a user with image-based articles, "[i]n the GPO, the original context of the print publication is not perceptible to the user" because "'[t]he display of each article

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[5] Petitioner's amici contend that both the Eleventh and Second Circuits have glided over pivotal legislative history illuminating Congress' intent. *See* Br. Amici Curiae of Am. Soc'y of Media Photographers, et al., No. 08-428 at *9-13 (Nov. 3, 2008). Their criticism badly misses the mark. Both courts thoroughly canvassed § 201(c)'s legislative history, including a careful focus on various drafts and amendments, as well as House and Senate Reports, of § 201(c). *See Greenberg III*, 533 F.3d at 1253-55; *Faulkner II*, 409 F.3d at 34, 39. Similarly, the district court in *Faulkner I* meticulously scrutinized House Judiciary Report 94-1476, upon which this Court relied in *Tasini*, in concluding that the CNG is a privileged revision. *See Faulkner I*, 294 F. Supp. 2d at 539-41; *id.* at 541 ("Congress quite clearly intended that the Section 201(c) revision privilege extend to collective works which, like the revision of an encyclopedia, contain original contributions along with new or updated material."); *see also Tasini*, 533 U.S. at 497. Finally, in the Second Circuit's groundbreaking opinion that gave rise to this Court's decision in *Tasini*, Judge Winter (writing for a unanimous panel) meticulously reviewed § 201(c)'s legislative history to discern the Congressionally-ordained balance between freelancers and publishers. *See Tasini v. New York Times Co.*, 206 F.3d 161, 167-68 (2d Cir. 2000) (citing H.R. No. 94-1476 and the Copyright Act of 1909).

provides no links to articles appearing on other pages of the original print publications' and a user cannot simply 'flip' to another article." *Id.* at 1253 (quoting *Tasini*, 533 U.S. at 491 & n.2). In other words, the GPO fails to preserve the original in-tact periodical and only presents individual articles isolated from their original collective work. "This is in direct contrast to the CNG where the user is free to flip through the pages or issues of the Magazine after conducting a search, thereby preserving the original and complete context of the print issues." *Id.*

B. *Greenberg III* Is Fully Consistent With The Second Circuit's Decision in *Faulkner II*.

Not only is *Greenberg III* fully consistent with *Tasini*, the Eleventh Circuit has now entirely eliminated the pre-existing conflict with the Second Circuit.

Before this Court set forth its authoritative guidance in *Tasini*, *Greenberg I* presented the Eleventh Circuit with its first occasion to define a protected "revision" under § 201(c). The *Greenberg I* panel concluded wrongly. Nevertheless, armed with *Greenberg I*, the *Faulkner* plaintiffs invited its authoritative acceptance by Judge Kaplan. He declined the invitation. In a comprehensive opinion, Judge Kaplan meticulously explained that *Tasini* "took a different approach" than *Greenberg I*. *Faulkner I*, 294 F. Supp. 2d at 537. Specifically, Judge Kaplan concluded that "the CNG is a 'revision' of the individual print issues of the *Magazine*" because:

> [t]he material [in the CNG] ... is presented to, and perceptible by, the user precisely as it

> appeared in print. ... It certainly contains elements that are consistent and recognizable from the *Magazine* so that a relationship between the original and the CNG is apparent.

Id. at 540-41 (internal quotations & alteration omitted).

A unanimous Second Circuit affirmed this conclusion. Agreeing fully with Judge Kaplan's careful analysis of § 201(c) and likewise rebuffing *Greenberg I*, the Second Circuit concluded that *Greenberg I*'s approach could not be squared with *Tasini*.[6] Speaking for the panel, Judge Winter fully considered *Greenberg I's* approach—and rejected it:

> *Greenberg* [*I*] held that if a subsequent work contains independently copyrightable elements not present in the original collective work, it cannot be a revision privileged by Section 201(c). Several months later, however, the Supreme Court held in *Tasini* that the critical analysis focused on whether the underlying works were presented by the particular database in the context of the original works. For example, in a straightforward application of that analysis, it also strongly implied, by contrasting the database to microfilm, that microfilm would

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[6] It bears emphasis that the writing judge in *Faulkner II*, Judge Winter, was also the author of the Second Circuit's decision in *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 2000), which this Court affirmed in the watershed case that controls the issue here.

> constitute a privileged revision. 533 U.S. at 501. In our view, the *Tasini* approach so substantially departs from the *Greenberg* analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate.

Faulkner II, 409 F.3d at 37.

In short, the *en banc* Eleventh Circuit has corrected the *Greenberg I* panel's pre-*Tasini* misunderstanding and brought that court into complete harmony with its sister circuit.[7]

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[7] In this critical regard, there is no longer any confusion about the permissibility for publishers to create digital archives of their collective works. Indeed, since this Court's decision in *Tasini* and the Second Circuit's decision in *Faulkner II*, publishers have devoted considerable resources to make back issues available to the public in digital forms. For example, *The Complete New Yorker: Eighty Years of the Nation's Greatest Magazine* has been published on DVD and on a portable hard drive. *See* Amazon.com, available at http://www.amazon.com/Complete-New-Yorker-Greatest-Magazine/dp/1400064740 (last visited Nov. 4, 2008). Additionally, *Rolling Stone Cover-to-Cover: The First 40 Years* was released to the public this fall on DVD. *See* Amazon.com, available at http://www.amazon.com/Rolling-Stone-Cover-First-Years/dp/0979526108 (last visited Nov. 4, 2008). *The Nation* has also created a digital archive of exact images of its pages dating back to 1865, which is available to the public online. *See* TheNation.com, available at http://www.thenation.com/archive/ (last visited Nov. 4, 2008). Finally, past issues of newspapers such as *The New York Times* and *Hartford Courant* (among others) have been made available in their entirety through online services such as ProQuest. *See* ProQuest.com, available at http://proquest.com/en-US/catalogs/databases/detail/pq-hist-news.shtml (last visited Nov. 4, 2008).

C. *Greenberg III* Is Fully Consistent With Congress' Policy Behind § 201(c).

Finally, *Greenberg III* fosters sound public policy, as expressed by Congress and recognized by this Court in *Tasini*. In enacting § 201(c), Congress was primarily concerned with ensuring that freelancers did not forego their rights in their individual contributions. *Tasini*, 533 U.S. at 497. In protecting freelancers' rights, however, Congress did not intend to compromise the rights of publishers to reproduce their collective works. *Id.* at 493-94. In this critical regard, *Greenberg III* carefully preserves the Congressionally-ordained balance. *See id.* at 493-94.

It bears emphasis that under *Tasini*, *Faulkner II* and *Greenberg III*, freelancers are at liberty to exploit their individual contributions. Indeed, Greenberg's own marketplace actions make the point. Greenberg has repeatedly sold to other periodicals several of his photographs, which first appeared in *National Geographic* magazine. For example, Greenberg sold two sets of such photographs to *Audubon* and *Boys' Life* magazines for $3500 each.[8] In like manner, National Geographic paid Greenberg $750 for the use of one of his photographs when the Society published the photograph in a different periodical—*National Geographic Traveler* magazine.

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[8] Indeed, Greenberg's photos that appeared in *Boys' Life* were published *after* publication of the CNG. The suggestion by Petitioner's amici, therefore, that *Greenberg III* and *Faulkner II* have negated a valuable right for photographers is demonstrably wrong. *See generally* Br. Amici Curiae of Am. Soc'y of Media Photographers, et al., No. 08-428 (Nov. 3, 2008).

On the other hand, Greenberg's sweeping view of § 201(c) would severely erode publishers' copyrights in their own collective works—including their ability to create and market digital archives. It is impossible, as a practical matter, for publishers retroactively to reach license agreements with their thousands of past freelance contributors. Some contributors may not be located; and some may attach an unreasonable value to their previously-compensated contributions. The only practicable solution for publishers would be to withdraw their archives from the market.[9]

This would be a grievous loss to the public. Eliminating a valuable educational archive (like the CNG), which has allowed inexpensive access to collective works, harms not only National Geographic, but also countless individuals, students, and scholars. "Taking from publishers the privilege to create electronic archives like The Complete National Geographic most certainly deprives society of the sort of fast, efficient, and inexpensive access to collective works that such a medium is uniquely positioned to offer." Jennifer L. Livingston, Casenote, *Digital "Revision": Greenberg v. National Geographic Society*, 70 U. Cin. L. Rev. 1419, 1436 (2002).

Not only did *Greenberg III* properly balance the competing rights of publishers and freelancers, it also upheld the bedrock principle of media neutrality embodied in the Copyright Act. *See Tasini*, 533 U.S.

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[9] It is hard to imagine how microfilm and microfiche would be exempt from this result.

at 502 ("[T]he transfer of a work between media does not alter the character of that work for copyright purposes." (internal quotation & brackets omitted)). *Greenberg III* permits a publisher to reproduce collective works in new media, so long as it faithfully reproduces "intact periodicals," not "individual articles." *Id.*; *see also id.* at 503 (noting that the "crucial fact" was that "the [challenged] Databases ... store and retrieve articles *separately* within a vast domain of diverse texts," rather than leaving the articles within the context of the particular collective works to which the authors contributed (emphasis added)). This type of analysis ensures that collective-work owners can bring their periodicals to a new, more technologically advanced medium. And it permits publishers to share their creations with a wider market for public use and consumption. At the click of a mouse, generations to come will be able to access and view untold numbers of educational periodicals with limitless amounts of information. *See generally* Br. of Amicus Curiae Magazine Publishers of America, 2006 WL 4402465 (June 7, 2006). Equally important, archivists and libraries greatly benefit from this technological advance. Rather than housing every newspaper and magazine in print format, online and CD-ROM versions can be used for storage, which is not only a more reliable method for archival and preservation purposes than printed materials, but also greatly reduces libraries' space requirements. *See generally* Br. of Amicus Curiae American Library Association, 2006 WL 4402466 (June 6, 2006). This is precisely what Congress intended.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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